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DISTRICT OF OREGON

BY

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 Plaintiffs

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7

8 IN THE UNITED STATES DISTRICT COURT  
 9 FOR THE DISTRICT OF OREGON

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 and

13 THE CONFEDERATED TRIBES OF  
 14 THE WARM SPRINGS RESERVATION  
 15 OF OREGON, CONFEDERATED TRIBES  
 16 AND BANDS OF THE YAKIMA INDIAN  
 NATION, CONFEDERATED TRIBES OF  
 THE UMATILLA INDIAN RESERVATION  
 and NEZ PERCE TRIBE OF IDAHO,

Civil No. 68-513

17 Plaintiff-Intervenors,

18 v.

19 STATE OF OREGON,

20 Defendant,

21 and

22 STATE OF WASHINGTON,

23 Defendant-Intervenor,

24 STATE OF IDAHO,

25 Defendant-Intervenor,

26 and

)  
 JOINT MEMORANDUM OF  
 COLUMBIA RIVER TRIBES AND  
 STATE OF WASHINGTON IN  
 OPPOSITION TO SHOSHONE-  
 BANNOCK TRIBES' MOTION  
 TO INTERVENE

1338

Page 1, JOINT MEMORANDUM IN OPPOSITION TO INTERVENTION

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Not properly paginated  
 Per LR 150-1/mj

1 SHOSHONE-BANNOCK TRIBES, )  
 2 )  
 2 Applicant for Intervention.)

3 I.

4 INTRODUCTION

5 The Shoshone-Bannock Tribes of the Fort Hall Reservation in  
 6 southeastern Idaho have moved for permissive intervention and  
 7 intervention as of right in this eighteen-year-old Indian fishing  
 8 rights case. The Warm Springs, Yakima, Umatilla and Nez Perce  
 9 tribes (Columbia River tribes) and the State of Washington oppose  
 10 the Shoshone-Bannocks' motion because intervention at this late  
 11 stage in the proceedings would be untimely and prejudicial to  
 12 existing parties. Intervention by the Shoshone-Bannocks would  
 13 confront the court with novel and difficult issues of law and  
 14 fact concerning the scope of the Shoshone-Bannocks' off-  
 15 reservation fishing rights under the Fort Bridger Treaty of 1868.  
 16 The litigation of these issues would significantly expand the  
 17 scope of this case and would interrupt and set back the parties'  
 18 two-and-a-half-year effort to negotiate an allocation and manage-  
 19 ment plan for Columbia River fisheries.

20 II.

21 INTERVENTION AS OF RIGHT UNDER RULE 24(a)(2)

22 A motion for intervention as of right must satisfy four  
 23 requirements: (1) the motion must be timely; (2) the applicant  
 24 must assert an interest relating in the subject matter of the  
 25 litigation; (3) the applicant's interest must be impaired by  
 disposition of the action without the applicant's involvement;

1 and (4) the applicant's interest must be inadequately represented  
 2 by the other parties. United States v. \$129,374 in U.S.  
 3 Currency, 769 F.2d 583, 585 (9th Cir. 1985). The applicant has  
 4 the burden of proving each of the four elements of intervention  
 5 as of right; the lack of one element requires that the motion to  
 6 intervene be denied. Keith v. Daley, 764 F.2d 1265, 1268 (7th  
 7 Cir. 1985).

8

9 A. THE SHOSHONE-BANNOCK MOTION IS UNTIMELY.

10 The threshold question in determining whether intervention  
 11 should be allowed, either as a matter of right or permission, is  
 12 whether the application is timely. Arkansas Electric Energy  
 13 Consumers v. Middle South Energy, Inc., 772 F.2d 401, 403 (8th  
 14 Cir. 1985). Although the issue of timeliness "is determined from  
 15 all the circumstances," NAACP v. New York, 413 U.S. 345, 366  
 16 (1973), three factors receive particular attention: (1) the  
 17 stage of the proceedings at which the movant seeks to intervene;  
 18 (2) the prejudice to other parties that would result from inter-  
 19 vention; and (3) the reason for and length of the delay. United  
States v. Oregon, 745 F.2d 550, 552 (9th Cir. 1984).

20

21 1. Stage of the Proceedings.

22 This eighteen-year-old litigation entered a new phase on  
 23 September 1, 1983, when the district court ordered the parties to  
 24 negotiate a new fisheries allocation and management plan to  
 25 replace the 1977 Five-Year Plan. United States v. Oregon, 745  
 26 F.2d at 552. Unlike Idaho, which moved to intervene in this case

1 on the same day the court ordered negotiation of a new plan, the  
 2 Shoshone-Bannocks' motion was filed more than two years after the  
 3 case entered its current phase of intensive negotiations on a new  
 4 allocation and management plan. Moreover, unlike Idaho, which  
 5 has attended and participated in all aspects of the current nego-  
 6 tiations, the Shoshone-Bannocks had expressed no interest in the  
 7 negotiations until the intervention motion was filed October 11,  
 8 1985.

9 The Shoshone-Bannocks claim there have been no "serious  
 10 negotiations" since the district court's September 1, 1983, order  
 11 and that the "first major negotiating session" did not occur  
 12 until October 21, 1985. Memorandum in Support of Motion to  
 13 Intervene at 17. The Shoshone-Bannocks obviously are in no  
 14 position to characterize the parties' two-and-one-half years of  
 15 work on a new plan. Having waited more than two years before  
 16 attempting to intervene in the negotiations phase of the litiga-  
 17 tion, and having expressed no interest whatsoever in the negotia-  
 18 tions during that time, the Shoshone-Bannocks simply do not know  
 what has occurred.

19 As shown by the Affidavit of Jean Edwards, between September  
 20 1983 and June 1984, fourteen large-group (policy, technical and  
 21 legal representatives of all parties and amici) negotiating ses-  
 22 sions were held as well as numerous technical and attorney sub-  
 23 group meetings. A large amount of technical work and legal  
 24 drafting was accomplished during this period. In late summer  
 25 1984, the negotiations were restructured with a five-member core  
 26 group undertaking intensive technical and drafting assignments

1 based on the documents developed in the earlier phase of the  
 2 negotiations. From that time until the present, the parties have  
 3 held a number of large-group meetings to hear reports on the core  
 4 group's progress, give policy direction to the core group, and  
 5 make technical and legal drafting assignments to other subgroups.

6 In addition, a draft plan produced by the core group has been the  
 7 subject of large-group negotiations since the fall of 1985.

8 *Affidavit of Jean Edwards at 3-6.*

9 While the parties have agreed to keep the substance of the  
 10 negotiations confidential, it can be said that the parties have  
 11 made very significant progress toward agreement on a number of  
 12 issues, including some which the Shoshone-Bannocks claim an  
 13 interest in, and are unanimous in the hope that this two-and-a-  
 14 half-year effort can be brought to a conclusion in the very near  
 15 future. This is not to say the parties know they will have a  
 16 plan this month or the next month; some issues may be unresolva-  
 17 ble through negotiation and will have to be presented to the  
 18 court for determination. It is likely, however, that the parties  
 19 will know very soon what they can agree on and what they cannot  
 20 agree on, if anything. When that point is reached, the current  
 21 negotiations phase of this litigation, which began September 1,  
 22 1983, will end.

23 The Shoshone-Bannocks, instead of getting in on the ground  
 24 floor of this phase of the litigation, are actually trying to  
 25 enter the case as this phase is about to be concluded. See Aleut  
Corporation v. Tyonek Native Corporation, 725 F.2d 527, 530 (9th  
 26 Cir. 1984) ("intervention on the eve of settlement following

1 several years of litigation was not timely"). Accordingly, the  
 2 Shoshone-Bannocks' motion to intervene at this late stage of the  
 3 current negotiations is untimely under Fed.R.Civ.P. 24(a)(2).

4

5 2. Prejudice To Existing Parties If Intervention Is  
Permitted.

6 Prejudice to the existing parties is "the most important  
 7 factor in determining the timeliness of a motion to intervene as  
 8 of right." Petrol Stops Northwest v. Continental Oil Company,  
 9 647 F.2d 1005, 1010 (9th Cir. 1981). The Shoshone-Bannocks'  
 10 delayed intervention in this case would prejudice the existing  
 11 parties in two ways. First, the negotiations will have to be  
 12 suspended indefinitely to litigate the scope of the Shoshone-  
 13 Bannocks' off-reservation fishing rights under the Fort Bridger  
 14 Treaty of 1868. Second, if the Shoshone-Bannocks succeed in  
 15 obtaining the relief requested in their complaint in interven-  
 16 tion, the negotiations will have to be repeated to accommodate  
 17 the newly determined fishing rights of the Shoshone-Bannock  
 18 Tribes.

19 a. The necessary litigation of Shoshone-Bannock  
 20 Treaty fishing rights would prejudice the existing  
 parties.

21 Unlike Idaho, which sought to intervene in this case "to  
 22 participate in negotiations for a modified management plan which  
 23 could have significant impact on Idaho's fish resources," United  
 24 States v. Oregon, 745 F.2d at 551; see also Idaho's "Pleading in

25 Intervention" (Civil Docket Sheet No. 1140), the Shoshone-Bannock  
 26 Tribes have intervened in this action to determine the nature and

1 scope of their off-reservation treaty fishing rights. Specifically,  
 2 the Shoshone-Bannocks have asked the court for a declaratory  
 3 judgment that they have a right to "an equitable share" of  
 4 the salmon and steelhead runs, and for an injunction against the  
 5 plaintiff tribes and defendant states prohibiting them from  
 6 authorizing prior intercepting fisheries that "threatens the pre-  
 7 servation of the wild runs of chinook salmon and steelhead trout  
 8 spawning within the aboriginal fishing areas of the Shoshone-  
 9 Bannock Tribes." Complaint in Intervention at 9.

10 Thus, unlike Idaho, which entered this case at the beginning  
 11 of the current negotiations with its rights already determined,<sup>1</sup>  
 12 the Shoshone-Bannocks seek to enter this case two-and-one-half  
 13 years later to ensure that any new management plan satisfies  
 14 their right to "a fair share" of the resource (Memorandum in  
 15 Support of Motion To Intervene at 9) without it having ever been  
 16 determined that they have such a right. Recognizing this, the  
 17 Shoshone-Bannocks seek a declaratory judgment that the 1868 Fort  
 18 Bridger Treaty includes an allocation right and the right to  
 enjoin the existing parties' fisheries.

19 Simply stated, the undetermined scope of the Shoshone-  
 20 Bannocks' treaty fishing rights means that if intervention is  
 21 granted the current negotiations will have to be suspended for a  
 22

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23  
 24 <sup>1</sup> Idaho's rights with respect to the Columbia River tribes  
 25 have been determined by the previous decisions and orders in the  
 26 case. Idaho's rights with respect to the other defendant states  
 were determined in Idaho ex rel Evans v. Oregon and Washington,  
 462 U.S. 1017 (1983).

1       judicial determination of the allocation rights and injunctive  
 2       powers, if any, of the Shoshone-Bannock Tribes. Such a suspen-  
 3       sion of the negotiations clearly would be prejudicial to the  
 4       existing parties. As explained below, the unanswered questions  
 5       concerning the Shoshone-Bannocks' off-reservation fishing rights  
 6       means the litigation to determine these rights is likely to be  
 7       lengthy, complex, and the outcome uncertain.

8       The off-reservation fishing right of the Shoshone-Bannock  
 9       Tribes is based on language in the 1868 Fort Bridger Treaty  
 10      reserving to those tribes "the right to hunt on the unoccupied  
 11      lands of the United States so long as game may be found thereon,  
 12      and so long as peace subsists among the whites and Indians on the  
 13      borders of the hunting district." Article 4, Fort Bridger Treaty  
 14      of July 3, 1868, 15 Stat. 209. The Columbia River tribes, on the  
 15      other hand, brought this action eighteen years ago based on lan-  
 16      guage in 1855 treaties reserving "the exclusive right of taking  
 17      fish in the streams running through and bordering said reserva-  
 18      tion...and at all other usual and accustomed stations, in common  
 19      with citizens of the United States." Article 1, Treaty with the  
 20      Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963.

21       While Article 4 of the Fort Bridger Treaty has been examined  
 22      by both state and federal courts, no court has held that Article  
 23      4 includes the right to an allocation of the salmon resource and  
 24      the related right to enjoin other users of the resource to ensure  
 25      that fish return to the Shoshone-Bannock fishing places. State  
 26      v. Tinno, 497 P.2d 1386 (Idaho 1972), determined that the "right  
 27      to hunt" in Article 4 includes the right to fish, id. at 1390,

1 that a certain location on the Yankee Fork of the Salmon River in  
2 central Idaho is "unoccupied lands of the United States," id. at  
3 1391, and that Idaho's authority to regulate Shoshone-Bannock  
4 off-reservation fishing is limited to conservation purposes only,  
5 id. at 1393. State v. Cutler, No. 14699 (Idaho March 19, 1985),  
6 addressed the geographical scope of the off-reservation rights  
7 reserved under Article 4 and determined that "unoccupied lands of  
8 the United States" did not include a state-owned wildlife manage-  
9 ment unit maintained as a wintering range for elk and deer. Id.,  
10 slip op. at 11. United States v. Top Sky, 547 F.2d 483 (9th Cir.  
11 1976), determined that the "right to hunt" in Article 4 did not  
12 include the right to sell eagles commercially. Id. at 488. None  
13 of these cases addresses the issue of whether Article 4 includes  
14 not only the right to hunt and fish but also the right to ensure  
15 that fish and game resources will always be available for  
16 Shoshone-Bannock harvest. While the existence of such rights  
17 should not be determined in the context of a motion to intervene,  
18 it should be noted that these rights are highly uncertain in view  
19 of recent court decisions and in view of the Article 4 language  
20 limiting the duration of off-reservation rights to "so long as  
game may be found thereon."

21 The Idaho Supreme Court in State v. Cutler held that the  
22 Indians' understanding of the Article 4 language was that their  
23 off-reservation treaty rights "were not absolute and would dimin-  
24 ish with the increased occupation of the lands and the decrease  
25 in available game." Slip op. at 9 (emphasis added). The Cutler  
26 court, which was focusing only on the Article 4 language

1 referring to "unoccupied lands of the United States," relied  
 2 heavily on the 1984 federal court decision in United States v.  
 3 Hicks, 582 F.Supp. 1162 (W.D. Wash. 1984). The Hicks court, in  
 4 determining that a treaty-reserved right to hunt on "open and  
 5 unclaimed lands" did not include the right to hunt in Olympic  
 6 National Park, characterized the Quinault Tribe's off-reservation  
 7 hunting right as "not an absolute right" but rather a "defeasible  
 8 privilege giving way as the status of 'open and unclaimed' land  
 9 changes." Id. at 1165. The characterization of Article 4 of the  
 10 Fort Bridger Treaty as reserving non-permanent, off-reservation  
 11 rights is acknowledged even by the strong dissent in State v.  
 12 Cutler which recognized as a "fact that the Indians in 1868  
 13 conceded that their hunting rights would diminish in time." Slip  
 14 op. at 21.

15 In marked contrast to the self-limiting language of the Fort  
 16 Bridger Treaty provision, the fishing clause in the 1855 Columbia  
 17 River treaties was interpreted by this court almost eighteen  
 18 years ago to reserve to the Indians "an absolute right" to their  
 19 fisheries and to "a fair share" of the fish produced by the  
 20 Columbia River system. Sohappy v. Smith, 302 F.Supp. 899, 911  
 21 (D.Or. 1969).<sup>2</sup> The right of the Columbia River tribes to a "fair

22

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23       2 Language somewhat similar to the Article 4 Fort Bridger  
 24 Treaty language appears elsewhere in the 1855 Columbia River  
 25 tribes' treaties. Although it has been the subject of litigation  
 26 several times, see State v. Arthur, 261 P.2d 135 (Idaho 1953);  
State v. Chambers, 506 P.2d 311 (Wash. 1973); Confederated Tribes  
of Umatilla Indian Reservation v. Maison, 262 F.Supp. 871 (D.Or.  
 1966), this language is not the basis of the tribes' off-  
 reservation fishing rights.

1 share" allocation, which the Shoshone-Bannocks also claim they  
 2 are entitled to, has been quantified to mean 50 percent of each  
 3 harvestable run destined to pass the tribes' usual and accustomed  
 4 fishing places. Washington v. Passenger Fishing Vessel Association, 443 U.S. 658, 685-686 (1979). The source of the 50 percent  
 5 allocation right is the "in common with" language of the treaties  
 6 which has been held to secure to the tribes "an interest in the  
 7 fish runs themselves," id. at 677, with both Indians and non-  
 8 Indians "sharing equally" in the resource. United States v. Washington, 384 F.Supp. 312, 343 (W.D. Wash. 1974).

10  
 11 Neither the "in common with" language, nor anything remotely  
 12 similar to it, appears in the Fort Bridger Treaty. Instead, the  
 13 Fort Bridger Treaty appears to disclaim "an interest in the fish  
 14 runs themselves" by limiting the duration of off-reservation  
 15 rights to "so long as game may be found thereon." This language  
 16 has never been interpreted, nor has any similar language in  
 17 another Indian treaty, by any court that we are aware of.

18 In sum, the best that can be said for the Shoshone-Bannocks'  
 19 claim of allocation and injunctive rights is that the existence  
 20 and nature of such rights is undetermined. Since this case was  
 21 originally brought to allocate the Columbia River anadromous  
 22 fishery, United States v. Oregon, 657 F.2d 1009, 1015 (9th Cir.  
 23 1981), and since the parties' current negotiations are on "a new  
 24 plan for allocation and management", United State v. Oregon, 796  
 25 F.2d 1410, 1418 (9th Cir. 1985), the uncertainty over the  
 26

1 Shoshone-Bannocks' allocation and injunctive rights must be judicially resolved, if intervention is allowed, before the negotiations on a new plan can be resumed and before a completed plan  
 2  
 3 can be presented to the court for approval.

4 Such a judicial determination must first settle whether such  
 5 rights exist. If they do, it must then be determined what share  
 6 the Shoshone-Bannocks are entitled to, and which of the existing  
 7 parties must give up a part of their allocation to the Shoshone-  
 8 Bannocks. The necessity for litigation to determine the scope of  
 9 the Fort Bridger Treaty fishing right, and the resulting indefinite  
 10 suspension of the parties' current negotiations, clearly and  
 11 emphatically demonstrate the prejudice to the other parties that  
 12 would result from the Shoshone-Bannocks' belated intervention in  
 13 this case.

14  
 15 b. Restarting the negotiations to accommodate  
 16 Shoshone-Bannock fishing rights would prejudice existing parties.

17 Even more prejudicial to the existing parties is the fact  
 18 that if the Shoshone-Bannocks obtain a declaratory judgment that  
 19 they are entitled to an allocation of the fish runs, the parties  
 20 will have to go back and start the negotiations over again to  
 21 accommodate the newly established rights of the new party. The  
 22 need to meet the allocation requirements of the new party may  
 23 very well undo some delicately balanced agreements already  
 24 reached in the negotiations process and could frustrate the completion  
 25 of an overall allocation and management agreement. Clearly,  
 26 the prejudice to the existing parties that would result from intervention by the Shoshone-Bannock Tribes at this stage of

1 the litigation is very substantial and requires denial of the  
 2 motion to intervene as untimely.

3

4 3. Reasons For and Length of Delay.

5 This case has been in litigation for eighteen years and has  
 6 been in its current stage of negotiations on a new allocation and  
 7 management plan for two-and-a-half years. In view of these  
 8 obviously substantial time intervals during which the Shoshone-  
 9 Bannocks could have, but did not, seek to intervene, the  
 10 Shoshone-Bannocks should be required to give some very good  
 11 reasons for their delay. They have, however, offered no substan-  
 12 tial reasons. In their memorandum in support of the intervention  
 13 motion, the Shoshone-Bannocks say they did not intervene  
 14 previously because of "limited resources available to adequately  
 15 represent its interest." Yet, the Shoshone-Bannocks had the  
 16 resources in 1979 to intervene (without opposition) in the  
 17 related case of Confederated Tribes of the Warm Springs Reserva-  
18 tion of Oregon, et al., v. Kreps, Civ. No. 79-541 (D.Or. 1979).  
 19 Moreover, the Shoshone-Bannocks' memorandum fails to explain why  
 20 they have the resources to intervene now but did not have such  
 resources in the preceding eighteen years of the litigation.

21 The Shoshone-Bannocks also justify their delay on the basis  
 22 of fears that intervention would be perceived by the Columbia  
 23 River tribes as "an intrusion and attack on [the Columbia River  
 24 tribes'] treaty fishing rights." Memorandum in Support of Motion  
 25 to Intervene at 19. In view of the applicant's complaint in  
 26 intervention, which seeks declaratory and injunctive relief

1 against the Columbia River tribes, and in view of their papers in  
 2 support of intervention, which charge the Columbia River tribes  
 3 with allowing "greed" to replace traditional Indian values (Affi-  
 4 davit of Frederick Auck at 3), this factor is not a reason for  
 5 delay but is a self-imposed psychological restraint which the  
 6 Shoshone-Bannocks apparently have fully overcome.

7 The Shoshone-Bannocks also justify their delay on the grounds that they had requested that the United States represent  
 8 their interests in this litigation and were still waiting for a  
 9 response. However, it hardly seems reasonable to wait six years  
 10 for a reply to a single, two-paragraph letter to conclude that  
 11 the tribe's interest in the litigation will not be protected by  
 12 the United States.

13 Especially puzzling on the issue of the reasons for delay is  
 14 the fact that the Shoshone-Bannocks appeared at an April 19, 1985  
 15 hearing in this case and informed Judge Levy "of our intent to  
 16 file a motion to intervene. We believe we will do that this  
 17 coming Monday or Tuesday. And in that motion to intervene, we  
 18 will be requesting to participate on a continuing basis in these  
 19 proceedings." April 19, 1985 Tr., Vol. 2 at 35 (pp. 35-43 of the  
 20 April 19 transcript are attached as Exhibit "A"). The Shoshone-  
 21 Bannocks, however, did not file for intervention the following  
 22 Monday and, as the record shows, waited until six months later to  
 23 formally file for intervention.

24 During a November 7, 1985, telephone conference hearing held  
 25 in connection with the Shoshone-Bannock intervention motion, the  
 26 tribe justified this six-month delay on the grounds that it spent

1 April and May negotiating with the Columbia River tribes on ways  
2 to avoid intervention (which could have been done just as easily  
3 after the intervention motion was filed as before), the summer  
4 was spent fighting with the State of Idaho over salmon fishing  
5 regulations, and so the Shoshone-Bannock tribal governing body  
6 did not have time to take up the intervention matter again until  
7 September. This excuse for the six-month delay from April to  
8 October 1985, as well as the other reasons for the eighteen-year  
9 delay since the start of the case and the two-year delay since  
10 the case entered the current negotiations phase, are simply  
11 inadequate. See Arkansas Electric Energy Consumers v. Middle  
12 South Energy, Inc., 772 F.2d at 403-404 (reasons for delay  
13 because of alleged difficulties in securing client authorization  
14 to intervene were characterized as "not overly convincing" and  
15 "incredulous"). Clearly, the applicant has offered no plausible  
16 reasons for the extraordinary delay in seeking intervention,  
17 measured both from the time the action was instituted and, more  
18 importantly, from the time the district court ordered negotiation  
of a new plan.

19 In sum, because the litigation is nearing the end of the  
20 current negotiations phase, intervention would seriously preju-  
21 dice existing parties, and because the applicant failed to  
22 justify its delay in seeking intervention, the Shoshone-Bannocks'  
23 motion to intervene must be denied as untimely.

24 /////

25 /////

26 /////

1  
2 B. OTHER ELEMENTS OF INTERVENTION AS OF RIGHT.

3 The opposition of the Columbia River tribes and the State of  
 4 Washington to intervention by the Shoshone-Bannock Tribes is  
 5 based primarily on the untimeliness of the application. Additionally,  
 6 the Columbia River tribes and the State of Washington  
 7 believe the application may also fail the other three requirements  
 8 of intervention: an interest in the subject matter of the  
 9 action, inability to protect that interest without intervention,  
 10 and inadequate representation of that interest by existing par-  
 11 ties. However, determining whether the Shoshone-Bannocks' appli-  
 12 cation meets these requirements depends, in large part, on a  
 13 determination of whether Article 4 of the Fort Bridger Treaty  
 14 includes the right to an allocation of the fish runs and the  
 15 right to enjoin downstream users of the resource. If the  
 16 Shoshone-Bannocks have such rights, then they have an interest in  
 17 the litigation and could not rely on existing parties to protect  
 18 that interest. If, however, the Shoshone-Bannock treaty fishing  
 19 right is a limited-duration right for "only so long as game may  
 20 be found thereon" to catch whatever harvestable fish may reach  
 21 "unclaimed lands of the United States" in their aboriginal area,  
 22 then the Shoshone-Bannocks do not have an interest sufficient to  
 23 justify intervention, and the State of Idaho adequately protects  
 24 what interest they have in Idaho-bound fish runs. Accordingly,  
 25 if the court determines that the Shoshone-Bannocks' motion to  
 26 intervene is timely, the court may wish to consider granting the

1 Shoshone-Bannock Tribes provisional intervention pending adjudication of the claims raised in the complaint in intervention,  
2 with a final ruling on intervention to follow once the scope of  
3 the Fort Bridger Treaty fishing right has been determined.

5 Regardless of the outcome of any litigation on the scope of  
6 the Fort Bridger Treaty fishing right, it is unlikely that the  
7 Shoshone-Bannocks can satisfy the intervention requirement of  
8 demonstrating that the disposition of this case will impair or  
9 impede their ability to protect their interests.

10 The Shoshone-Bannocks' complaint requesting declaratory and  
11 injunctive relief assumes that a lot more fish, namely wild  
12 spring chinook and summer chinook, will return to the Shoshone-  
13 Bannock fishing areas in the headwaters of the Salmon River  
14 system in central Idaho if the Columbia River tribes' Zone 6  
15 ceremonial and subsistence fisheries and Oregon's and Washing-  
16 ton's lower river and ocean fisheries are curtailed. As shown by  
17 the Affidavit of Jean Edwards, this assumption is wrong.

18 The main reason for the decline and current depressed status  
19 of Salmon River basin wild spring and summer chinook stocks is  
20 the extensive downstream hydroelectric development, especially  
21 the four lower Snake River dams completed in the early 1970s.  
22 Affidavit of Jean Edwards at 17-18. Degradation of the natural  
23 habitat has also been a major factor. Id. at 8. The biological  
24 data show that these runs have declined even as downstream har-  
25 vest on these stocks have declined to *diminimus* levels. Id. at  
26 6-17, 20. The massive mortalities suffered by wild spring and  
summer chinook smolts from the Salmon River system as they

1 migrate to the ocean through eight reservoirs and over eight dams  
 2 means that these stocks cannot be rebuilt even with complete clo-  
 3 sure of all intercepting fisheries. Id. Indeed, the data show  
 4 that these stocks are so depressed that they make up only a tiny  
 5 fraction of the total spring and summer chinook harvest of the  
 6 intercepting fisheries, and the complete closure of these fish-  
 7 eries would return very few additional adult salmon to the  
 8 Shoshone-Bannock fishing areas. Id. at 14. Rebuilding these  
 9 stocks to harvestable levels simply cannot be accomplished by  
 10 further harvest restrictions. Id. at 20.

11 The scientific evidence shows that the stocks the Shoshone-  
 12 Bannocks fish on will improve only as improvements are made in  
 13 the smolt survival rates at the eight downstream hydroelectric  
 14 projects, as the spawning habitat is rehabilitated, and as  
 15 hatchery-produced fish are outplanted in the natural habitat to  
 16 supplement the wild stocks. Id. at 17-21. These corrective  
 17 measures, however, are not within the scope of this litigation.  
 18 Accordingly, regardless of the nature of the Shoshone-Bannock  
 19 treaty fishing right, intervention in this action will not ensure  
 20 restoration of the Shoshone-Bannock fisheries.

21 III.

22 PERMISSIVE INTERVENTION UNDER RULE 24(b)

23 Although not discussed in the memorandum in support of the  
 24 motion to intervene, the Shoshone-Bannocks' motion also requests  
 25

1 permissive intervention under Rule 24(b). As noted above, per-  
 2 missive intervention is subject to denial based on the untimeli-  
 3 ness of the motion. Arkansas Electric Energy Consumers v. Middle  
 4 South Energy, Inc., 772 F.2d at 403. Additionally, permissive  
 5 intervention will be denied if the applicant does not assert a  
 6 claim or defense which has a question of law or fact in common  
 7 with the main action. United States v. \$129,374 in U.S. Cur-  
 8 rency, 769 F.2d at 585.

9 Here, the Shoshone-Bannock Tribe claims that it seeks "to  
 10 align itself as a collective plaintiff in this action because its  
 11 claim against the defendants and the existing plaintiffs' claim  
 12 against the defendants raise common questions of law or fact."  
 13 Motion to Intervene at 5. However, it is obvious from their  
 14 pleadings, as well as their appearance at the April 19, 1985  
 15 hearing to support Idaho's motion for an injunction against the  
 16 Columbia River tribes' ceremonial and subsistence fisheries, that  
 17 the Shoshone-Bannocks' claims are more directed against the  
 18 existing plaintiffs, including the United States, than against  
 19 the defendant states. It is hard, therefore, to see what the  
 20 Shoshone-Bannock claims have in common with the plaintiffs'  
 claims against the defendants.

21 Moreover, the language of the Fort Bridger Treaty securing  
 22 off-reservation fishing rights to the Shoshone-Bannock Tribes has  
 23 nothing in common with fishing clause language in the treaties of  
 24 the plaintiff tribes. As a result, intervention will require  
 25 extensive litigation to determine the meaning of the Fort Bridger  
 26 Treaty language. Instead of furthering judicial economy by

1 seeking to join this case to litigate issues already before the  
2 court, the Shoshone-Bannocks seek to use this case as a vehicle  
3 to litigate in a federal forum unique and difficult issues  
4 regarding the scope of their treaty fishing rights, thus signifi-  
5 cantly expanding the scope of this case. Permissive intervention  
6 must be denied.

7

8 IV.

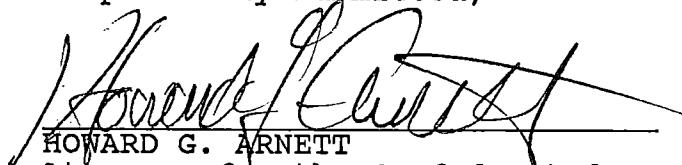
9

CONCLUSION

10 For the reasons set out above, the Columbia River tribes and  
11 the State of Washington respectfully request that the motion to  
12 intervene of the Shoshone-Bannock Tribes be denied.

13

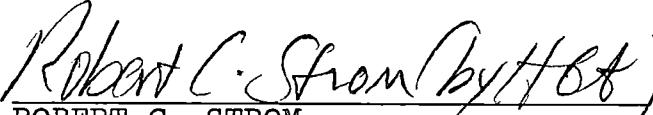
Respectfully submitted,

  
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19

  
20 TIM WEAVER  
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22 Tribes and Bands of the  
23 Yakima Indian Nation

24

  
25 ROBERT C. STROM  
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27 //

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Page

21, JOINT MEMORANDUM IN OPPOSITION TO INTERVENTION

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1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF OREGON  
3 UNITED STATES OF AMERICA, )  
4 Plaintiff, )  
5 vs. )  
6 THE CONFEDERATED TRIBES AND )  
7 BANDS OF THE WARM SPRINGS )  
8 RESERVATION OF OREGON; )  
9 CONFEDERATED TRIBES AND BANDS )  
10 OF THE YAKIMA INDIAN NATION; ) Civil Case No. 68-513  
11 CONFEDERATED TRIBES OF THE )  
12 UMATILLA INDIAN RESERVATION: )  
13 AND NEZ PERCE TRIBE OF IDAHO; )  
14 Plaintiff-Intervenors, )  
15 vs. )  
16 STATE OF OREGON, )  
17 Defendant, )  
18 and )  
19 STATE OF WASHINGTON, )  
20 Defendant-Intervenor, )  
21 and )  
22 STATE OF IDAHO, )  
23 Defendant-Intervenor. )  
24

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25 Hearing before The  
HONORABLE EDWARD LEAVY  
Friday, April 19, 1985  
United States District Court  
Portland, Oregon

1 tribal affidavits will be treated as live  
2 testimony. For that reason, we have made  
3 our witnesses available for cross examination  
4 and in fact, Idaho has taken advantage  
5 of that opportunity and just cross examined  
6 one of our witnesses. We want to cross  
7 examine Mr. Hansen. He isn't here. We  
8 can't do that. We felt that there is  
9 a fundamental problem about the fairness  
10 of treating his affidavit as if it were  
11 live testimony wherein we have no oppor-  
12 tunity to cross examine. We submit it  
13 should be stricken.

14 THE COURT: It's denied.

15 I take it that that is all of the  
16 evidence parties are going to present.

17 I haven't heard anything that the  
18 Shoshone Tribe seeks to present.

19 MR. ECHOHAWK: Thank you, Your  
20 Honor.

21 For the record, my name is Larry Echohawk,  
22 Tribal Attorney for the Shoshone-Bannock  
23 Tribe, located in Idaho.

24 Your Honor, it's our intent in requesting  
25 leave to make special appearance here today

1                   is to, in general terms, inform the Court  
2                   of our intent to file a motion to intervene.  
3                   We believe we will do that this coming  
4                   Monday or Tuesday. And in that motion  
5                   to intervene, we will be requesting to  
6                   participate on a continuous basis in these  
7                   proceedings.

8                   We do not have any affidavits or  
9                   witnesses to call at this time. But with  
10                   the indulgence of the Court, I would  
11                   request some latitude in addressing our  
12                   general concern about this particular  
13                   injunction.

14                   THE COURT: You can do that.

15                   MR. ECHOHAWK: Your Honor--

16                   THE COURT: I want to make it  
17                   clear to you that I will hear you and the  
18                   Court has not ruled that you can intervene,  
19                   either generally, in this case. And I'm  
20                   going to leave that to Judge Craig to decide,  
21                   in any event. And I've not ruled that you  
22                   will be permitted to intervene on this  
23                   motion. That will be decided. And I presume  
24                   the Court will have to decide, if the Court  
25                   decides the motion. But I want to hear you

1 now so that in the event the Court does  
2 decide to let you intervene on this motion,  
3 your position will be reported.

4 BY MR. ECHOHAWK: Your Honor, to  
5 reemphasize, we will be filing papers that  
6 will contain much of the information that  
7 I will state here. In general, I want to  
8 provide some background to the Court about  
9 the Shoshone-Bannock Tribe. As a tribal  
10 attorney, I represent the tribes that make  
11 up approximately 3,300 members. The  
12 reservation is located in Southeast Idaho.  
13 Initially, the Shoshone and Bannock people  
14 that now reside on the reservation actually  
15 come from five different bands or groups  
16 of Shoshone and Bannock Indians. And  
17 originally, they asserted aboriginal owner-  
18 ship to approximately twenty-five million  
19 acres of land. Although that has never been  
20 judicially determined, that is an approximate  
21 amount and included not only extensive  
22 portions of Southeast Idaho--Southern Idaho,  
23 but also included portions of other states.

24 Pursuant to the Fort Richards Treaty  
25 of 1868, this tribe ceded it's land claims

1 for a reservation that was to take up 1.6  
2 million acres of land and that being in  
3 existence today, the Fort Hall Reservation.

4 The size has been reduced to approximately  
5 five hundred and fifty thousand acres.

6 But by virtue of the 1868 Treaty, the tribes  
7 reserved to themselves the right to hunt  
8 on the unoccupied land of the United States  
9 under Article Four of that Treaty.

10 In 1972, the Idaho Supreme Court  
11 entertained a challenge to that Treaty right  
12 by the State of Idaho in that there had been  
13 a member of the tribe that had been arrested  
14 and prosecuted for fishing for salmon in  
15 the Yankee Fork Area, the Salmon River Basin.

16 The unanimous decision of the Supreme  
17 Court, the State of Idaho, upheld the  
18 interpretation of that 1868 Treaty. There  
19 the term, the right to hunt on unoccupied  
20 lands of the United States included the  
21 right to fish. And just recently in a  
22 Court case known as State vs. Cutler decided  
23 in a slip opinion form issued on March 19th  
24 of this year, the Court again unanimously  
25 reaffirmed that position and the interpre-

1 tation.

2 So the Shoshone-Bannock Tribes are  
3 virtually interested in what is occurring  
4 within these proceedings. What I want to  
5 point out to the Court, in the last decade,  
6 approximately, from 1975, the tribe began  
7 a process of having to impose upon it's  
8 members a series of restrictive regulations.

9 To describe a few of those things, under  
10 tribal regulation, right now, tribal members  
11 are not able to exercise the off reservation  
12 Treaty rights unless they have been members  
13 of the reservation and residents for at  
14 least one year. In addition to that, there  
15 is a limitation to the number of salmon  
16 that can be taken per family to forty  
17 salmon per family. The tribes also have  
18 imposed restrictions that the only method  
19 of taking the salmon is with the traditional  
20 Indian spear. And along with that, there  
21 has been a series of partial and total  
22 closures of that fishery.

23 The tribes have--it's estimated between  
24 1981 and 1983--only taken 142 fish. Last  
25 year we had a total closure because of the

1 size of the run.

2           Essentially, what the tribes' concerns  
3 are: Primarily, the wild run of salmon  
4 that move up to the Columbia River system  
5 that spawn in the aboriginal and traditional  
6 areas of the tribe, those runs have been  
7 decimated. In the last years, each reduc-  
8 tion in the numbers of salmon have required  
9 these restrictions to be imposed.

10           In the most and recent years, in the  
11 past five years, what fishing the tribe has  
12 done would be only characterized as symbolic  
13 fishing. The regulations were specifically  
14 written to open a fishery when we knew  
15 that the fish actually wouldn't be on site.  
16 And in 1978, the State of Idaho joined with  
17 The United States Government and ruled  
18 to close down and limit the tribal fisheries,  
19 so we find it of grave concern when we look  
20 down the river and we see other tribes  
21 that are able to enjoy some degree of sus-  
22 sistence in ceremonial fishing and for the  
23 Shoshone-Bannock people upriver where the  
24 wild runs are coming in, we don't have any  
25 fisheries to speak of at all.

1                   This is our concern in moving to  
2                   intervene in the proceedings and, of course,  
3                   we are concerned in the present injunction  
4                   efforts on the part of the State of Idaho  
5                   because, as we read the five-year plan,  
6                   which we have been excluded from, the  
7                   minimum escapement goal calls for 120 fish  
8                   over Lower Bonneville Dam. And the figures  
9                   that we are talking about right now are  
10                   not near that amount. It simply means to  
11                   us that given even the optimum figure of  
12                   90,000 fish coming over the Lower Dam, the  
13                   Shoshone-Bannock people are going to once  
14                   again be placed in a situation where they  
15                   are going to have a very restrictive or  
16                   probably totally closed fishery again for  
17                   their subsistence and ceremonial fishing.

18                   The Shoshone-Bannock Tribes are, as  
19                   far as I know, the only Northwest tribe  
20                   that has only a subsistence and ceremonial  
21                   fishery and not a commercial fishery. I  
22                   think they have gone out of their way to  
23                   impose restrictions upon their own membership,  
24                   in the name of conservation, and trying to  
25                   keep those wild runs preserved. Whereas we

1 see other Indian people fishing, we respect  
2 their Treaty rights. We are not appearing,  
3 in any way, to say that those Treaty rights  
4 are to be abrogated. But we are concerned  
5 about an equitable distribution.

6 It does not make sense to the Shoshone-  
7 Bannock Tribe for one Indian tribe to be  
8 granted a subsistence and ceremonial fishery  
9 when the upriver groups are totally denied  
10 from that. And I think the Shoshone-Bannock  
11 Tribes are to be commended for the restric-  
12 tions that they have placed but they have  
13 tried to not only impose self-preservation  
14 but to go in and improve the habitat spawning  
15 area to participate in sound management  
16 decisions that would bring more fish back.

17 But that process, I guess, as the  
18 tribes have learned, is not going to bring  
19 the number of salmon back into their fishing  
20 areas. And so I think that's why they are  
21 determined to make the attempt to intervene  
22 in these proceedings so that they can try  
23 to do something through the Court orders  
24 or if the plan is to be renegotiated to  
25 participate in that process. And with

1 expression, I would just simply say to the  
2 Court that we are hoping that the Court  
3 will consider that in a decision on this  
4 injunction matter and to consider other tribes  
5 with the Treaty rights that would like to  
6 have a subsistence in ceremonial fishing as  
7 well.

8 THE COURT: Very well.

9 Now, does the State of Idaho want to make  
10 an argument?

11 MR. GODDARD: Yes, Your Honor, but I  
12 think I could keep it brief.

13 THE COURT: Well, go ahead.

14 MR. GODDARD: Your Honor, as we have gone  
15 through these proceedings together, I think  
16 it's been clear that no one has predicted  
17 that the minimum spawning escapements will  
18 be met at the Lower Granite Dam. This will  
19 be the seventh year that these spawning  
20 escapements at Lower Granite Dam have not  
21 been met.

22 The evidence also shows, clearly, that  
23 the minimum spawning escapements will not be  
24 met through wild and natural runs coming to  
25 Idaho for the seventh consecutive year.